



July 15, 2016

Ex Parte Notice

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**RE: Expanding Consumers' Video Navigation Choices, MB Docket No. 16-42
Commercial Availability of Navigation Devices, CS Docket No. 97-80**

Dear Ms. Dortch:

NTCA—The Rural Broadband Association (“NTCA”)¹ hereby submits this letter to discuss additional proposals made by various parties in the Federal Communications Commission’s (“Commission”) set-top box proceeding. NTCA discusses herein both the February 18, 2016 “Information Flows” Notice of Proposed Rulemaking (“NPRM”)² as well as an alternative approach put forth by a group of large multichannel video programming distributors (“MVPDs”) and content creators³ (hereinafter referred to as the “Apps Alternative”).

As an initial matter, NTCA has consistently supported an approach to the issues presented in this proceeding that looks first to what consumers are actually using and demanding in terms of access to content. Increasingly, consumers are using their own devices and applications of all kinds to locate and view content, undertaking a natural transition far beyond anything that could have been anticipated twenty years ago or even five years ago. Consumers’ options are expanding rapidly, and any approach that threatens to chill investment or hinder innovation in this space as complex technical standards are considered and invented is one that ultimately harms, rather than furthers, consumer choice. NTCA (and many others) have also questioned

¹ NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers (“RLECs”). All of NTCA’s members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities.

² Expanding Consumers’ Video Navigation Choices, MB Docket No. 16-42, Commercial Availability of Navigation Devices, CS Docket No. 97-80, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 16-18 (rel. Feb. 18, 2016) (“NPRM”).

³ *Ex parte* letter from Paul Glist, on behalf of Vme TV, Revolt TV, TV One, NCTA, AT&T/DIRECTV, and Comcast to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. MB 16-42, CS Docket No. 97-80 (Jun. 16, 2016).

whether Section 629 of the Communications Act provides authority to create a new “set-top box” market when the statute actually speaks more directly to ensuring consumers can access content via devices of their own choosing.⁴

This being said, NTCA recognizes that the debate in this proceeding has evolved to revolve now around two potential proposals – the Information Flows proposal suggested by the NPRM and the Apps Alternative put forward by a group of stakeholders – that would achieve recently defined and refined goals sought by the Commission in terms of enabling “integrated search” and other specific functionality on competitive devices.⁵ NTCA believes in the first instance that the Apps Alternative at least hews closer to the ultimate objective of enabling consumer choice while avoiding the artificial, regulator-driven creation of device markets and contemplating compliance with technical mandates that do not yet even exist. At the same time, the Commission must recognize that the Apps Alternative, much like the Information Flows proposal, will still impose on small, rural MVPDs substantial network modification costs and thereby strain many of these providers’ ability to remain viable in an already difficult video distribution business environment. Therefore, consistent with the reasoning of a variety of stakeholders already on the record in this proceeding, these significant costs, as well the difficult circumstances under which small MVPDs operate, support an exemption for MVPDs serving fewer than 1 million subscribers from *any* rules finally adopted in this proceeding – whether the Information Flows proposal or the Apps Alternative.⁶

Adoption Of Either The NPRM’s Information Flows Proposal Or The Apps Alternative Will Require A Near Total Overhaul Of MVPDs’ Networks

The Information Flows Proposal

As an initial matter, NTCA reiterates its substantial concerns regarding the NPRM’s Information Flows proposal.⁷ Chief among this proposal’s many flaws is the premise of mandate imposition first, followed by the whole-cloth creation and adoption of a technology standard to implement that mandate. However, because there is no standard as of today (and there will not be one until a standards body creates one after an order is adopted) and there is no technology in existence today as a tested and proven manner by which MVPDs can provide the Information Flows to navigation device manufacturers, it is difficult for any party to estimate with precision the exact

⁴ See, Reply Comments of NTCA-The Rural Broadband Association, MB Docket No. 16-42, CS Docket No. 97-80 (fil. May 23, 2016) (“NTCA Reply Comments”), pp. 19-25.

⁵ As discussed further below, the recent (re)definition of the goals in the proceeding – goals that have gone from “unlock the box” to “ditch the box” – goes beyond the statute and notice and comment procedures and requires issuance of a further notice of proposed rulemaking to satisfy the requirements of the Administrative Procedure Act (“APA”).

⁶ See, Comments of TIVO INC., MB Docket No. 16-42, CS Docket No. 97-80 (fil. Apr. 22, 2016) (“TIVO April 22 Comments”), pp. 32-34; Letter from Thomas Cohen on behalf of the American Cable Association (“ACA”), to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 16-42, CS Docket No. 97-80 (fil. Jul. 12, 2016) (“ACA July 12 *ex parte*”).

⁷ See generally, Comments of NTCA, MB Docket No. 16-42, CS Docket No. 97-80 (fil. Apr. 22, 2016).

costs of complying with the proposal. This “cart before the horse” approach does not allow MVPDs (*or more importantly, the Commission itself*) to assess or fully understand the ramifications of the proposal or to conduct a meaningful cost/benefit analysis. In the end, neither MVPDs nor the Commission will fully understand whether the Information Flows proposal is technologically feasible, whether the costs outweigh the benefits to consumers, or whether alternative approaches might have better served the Commission’s goals until two to three years after adoption of the mandate.

That said, while the costs that MVPDs will incur in connection with the proposals made in the NPRM are difficult to quantify with precision – in terms of the exact network modifications and the exact costs – they are expected to be significant and can be viewed in terms of categories of costs. It is clear when viewing those categories that the Information Flows proposal will require a *near total overhaul of existing MVPD networks*. These categories of costs include, but are not limited to, gateway and security system costs and the costs of conducting the proper testing, as well as hardware, software, and middleware costs throughout MVPD networks. MVPDs will also have to modify headends, back-office systems, central office facilities and content servers to comply with the Information Flows proposal. Finally, MVPDs will be stuck with the ongoing responsibility of responding to consumer calls for “support” with respect to set-top boxes that have nothing to do with the MVPD’s services, substantially increasing operating costs for customer service.

In addition to these more tangible costs, the Commission should also consider – as part of a cost/benefit analysis of the Information Flows proposal – the likely “pause” on innovation that the proposal will induce. MVPDs of all sizes are likely to hold back on investments in improving the quality and availability of their networks for fear of additional investments that will be required to also come into compliance with the NPRM once the standards body completes its work. Indeed, small MVPDs already operating on a “break even” at best basis may have no choice but to suspend any current plans for investment in their MVPD networks; these providers cannot afford to invest in new technologies or new ways of doing business that may be undermined or mooted by new Information Flows unbundling rules adopted at some unknown time in the future pursuant to an unknown standard or set of standards yet to be created. The two-year timeframe between an order and the availability of third-party devices envisioned by the NPRM is a lifetime in the rapidly changing video marketplace and, in the end, it is consumers that will miss out on new products and services as this market stalls and awaits “regulator-driven innovation” instead.

The Apps Alternative

Even if it avoids the “cart before the horse” concern of adopting a mandate and then backing into technical standards to implement it, the Apps Alternative, much like the Information Flows proposal discussed above, will still require small MVPDs to expend significant financial resources in order to comply. These costs, like the Information Flows proposal, fall into several categories.⁸ As an initial matter, small MVPDs would be required to create (or perhaps license)

⁸ To be clear, the discussion contained herein as to the costs of compliance with the Apps Alternative is not meant to be a compressive or exhaustive list of potential costs. The exact nature of what features the Commission believes should be enabled by the Apps Alternative, should that approach be adopted, is unclear. Thus, the cost estimates provided herein are estimates of categories of costs only.

an “app” capable of delivering their video content to subscribers. While the app would be built consistent with the HTML5 standard, the use of an open and already existing standard does not reduce the costs that MVPDs will incur to create the app. Small MVPDs typically do not have the “in house” expertise to create such an app, and thus the use of outside resources to create or otherwise gain access to an app will impose an additional expense not required of larger MVPDs.⁹

In addition, MVPDs will be required to deploy an application programming interface necessary to enable their app to have access to the video content provided to the subscriber. Modifications to headends would also be required, as MVPD content would have to be transcoded into Internet Protocol format at every headend (even for current IPTV systems). Updated Digital Rights Management software would also be required.

It must also be remembered that while many larger MVPDs may have already begun to transition to an app-based delivery of their video content,¹⁰ many smaller MVPDs have not. To be clear, smaller MVPDs, who are already struggling merely to remain in the video distribution business, have made commendable and notable strides to innovate in service delivery. As the American Cable Association recently noted, small MVPDs “are increasingly deploying innovative set-top box software platforms (e.g. TiVo and Arris Moxi) that provide subscribers with access to OTT services alongside pay-TV offerings.”¹¹ That said, with respect to the Apps Alternative, larger providers already have a great deal of the underlying infrastructure in place to deliver their content via apps (indeed they already do so), thus making this alternative in certain respects a continuation of larger carriers’ existing business practices. To be clear, however, the Apps Alternative itself will require substantial investment even on the part of the largest providers to develop the apps and deploy additional IP-enabled infrastructure for implementation. For small MVPDs, however, the transition to app-based delivery of video content represents an even more significant overhaul of their networks and business practices, and thus this alternative would impose on these carriers a disproportionate cost burden.

Thus, as is clear from this discussion, the Apps Alternative cannot be viewed as a “panacea” or “silver bullet” that avoids substantial implementation costs as compared to the Information Flows proposal. While it holds promise in terms of potentially resolving certain copyright, advertising, privacy, and other issues raised by the numerous parties objecting to the NPRM’s proposals,¹² implementation of the alternative proposal or modified versions of it that may

⁹ It also unclear from the Apps Alternative proposal whether an MVPD’s app would be licensable by other MVPDs, and the rates, terms, and conditions under which it would be available. Such uncertainty for smaller providers should be of serious concern to the Commission as it contemplates the Apps Alternative.

¹⁰ See, Comments of the National Cable & Telecommunications Association (“NCTA”), MB Docket No. 16-42, CS Docket No. 97-80 (fil. Apr 22, 2016), pp. 11-14 (discussing the rapid consumer adoption of apps and the Comcast, Charter and Time Warner apps that have been tens of millions of consumers on a number of different devices).

¹¹ ACA July 12 *ex parte*, p. 2.

¹² See generally, Reply Comments of NTCA-The Rural Broadband Association, MB Docket No. 16-42, CS Docket No. 97-80 (fil. May 23, 2016).

emerge would still come at substantial cost to smaller MVPDs already struggling to operate in an already difficult MVPD market.

The Commission Should Adopt An Exemption From Any Rule Adopted In This Proceeding For MVPDs Serving Fewer Than 1 Million Subscribers

If action is taken in this proceeding – in terms of either the Information Flows proposals or a version of the Apps Alternative – the Commission should adopt a permanent exemption for small MVPDs serving fewer than 1 million subscribers.¹³ Upon further review and study of the alternatives as they have evolved and become better defined in the record, it has become clear that nothing less than a permanent exemption is needed and justified.

Small MVPDs already face significant challenges in the video business, particularly as content prices continue to strain their ability to remain viable. A 2015 survey of NTCA’s small MVPD members and other new entrants found that 95 percent of respondents agreed that the single biggest barrier to providing video service is obtaining access to reasonably priced programming.¹⁴ The cost of content continues to rise unabated by Commission action.¹⁵ The additional costs of compliance with either the Information Flows proposal or the Apps Alternative may push a number of these providers to exit this already struggling line of business. This will reduce rather than enhance competition in the availability of video products and access to content.

Beyond the significant challenges that small MVPDs already face in today’s video market, they also do not have the same level of resources as large and mid-size providers to comport with a new mandate. In arguing for a small MVPD exemption to the Information Flows proposal, TIVO correctly stated that “large MVPDs have the financial and engineering resources and are best equipped to help develop and introduce new standards. This has always been the case in the multichannel video industry.”¹⁶ This reasoning applies with equal force to the Apps

¹³ The Commission should move forward with its tentative conclusion to exempt analog-only MVPDs. As NTCA stated in comments in response to the NPRM, no standard for analog-only providers has even been considered in this proceeding or in the Downloadable Security Technology Advisory Committee (“DSTAC”) process, and thus it is unclear if any solution is technically feasible for these providers to comply with either the Information Flows or apps alternative proposals. Thus, the Commission’s tentative conclusions to exempt such providers is correct.

¹⁴ NTCA–The Rural Broadband Association and INCOMPAS’ 2015 Video Competition Survey, available at: http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/NTCA_2015VideoCompetitionSurvey.pdf. This survey also found that “72% of survey respondents have considered eliminating certain broadcast and/or non-broadcast programming and/or refrained from entering a market altogether as a result of rising programming costs.”

¹⁵ See, *Retrans fees are the gift that keeps on giving for US broadcasters*, www.rethinkresearch.biz (Jul. 7, 2016) (“Retransmission fees are set to hit multichannel TV operators in the US with a \$11.6 billion bill by 2022, up from \$7.7 billion by the end of 2016, according to the latest forecast from research firm SNL Kagan”), available at: <http://www.rethinkresearch.biz/articles/retrans-fees-gift-keeps-giving-us-broadcasters>.

¹⁶ TIVO April 22 Comments, p. 32.

Alternative, where small MVPDs cannot reasonably be expected to pour massive amounts of resources into developing on their own the applications envisioned by this alternative proposal or to cost effectively deploy the underlying infrastructure necessary to deploy app-based content delivery. Small MVPDs that “lack the purchasing power to negotiate affordable rates from set-top box manufacturers, conditional access vendors, etc,”¹⁷ are also unlikely to have significant purchasing power with respect to, for example, any software, hardware, middleware or gateway costs as may be required under either proposal (including any licensing of applications under the Apps Alternative). In the end, compliance with either the Information Flows or Apps Alternative proposals will impose on small MVPDs – entities that can least afford it – a disproportionate compliance burden.

An exemption for small MVPDs serving fewer than 1 million subscribers would not undermine the Commission’s goals for this proceeding. As the ACA has stated, such an exemption “would still allow 100 percent of all MVPD subscribers to enjoy whatever benefits the proposal might provide with at least two different MVPDs in the market, and 93 percent of all MVPD subscribers with at least three different MVPDs in the market.”¹⁸ Thus, an exemption as proposed herein would still produce the competition in the device market that the Commission desires for all or nearly all MVPDs subscribers nationwide while preserving small MVPDs’ ability to remain a viable alternative for rural consumers.

In addition, an exemption would provide small MVPDs that choose to do so – and have the resources and technical expertise necessary to do so – the opportunity to move to an apps-based delivery of video content *based on their own timetable and based on their own business strategy and competitive needs*. On the other hand, a mandate that requires adoption of the Apps Alternative by “regulatory fiat” is a “one-size-fits-all” approach that lumps every MVPD large and small into the same category, assuming that each provider has the same capital and technical resources. A mandate in this proceeding, or even a deferred compliance date for small MVPDs, would fail to account for the fact that small MVPDs such as those represented by NTCA operate under unique circumstances far different from larger and mid-size MVPDs, providing service (including voice and broadband via affiliated entities) in some of the nation’s most challenging to serve rural areas. Even within the small MVPD community, there are significant differences among these carriers that must be taken into account as a matter of good public policy and Regulatory Flexibility Act analysis in reaching any decisions. An exemption for small MVPDs will account for the varied ability amongst small MVPDs, allowing some to move to an app should they have the resources to do so and that make the determination that such an approach fits a business need while granting those that do not the ability to remain viable and continue to provide service using their existing facilities.

Moreover, an exemption for small MVPDs would be entirely consistent with the language of Section 629; nothing in Section 629 requires regulations adopted pursuant to that provision to apply to all MVPDs, nor does it require that commercially available equipment that becomes available as a result of those regulations be compatible with every single MVPD. In fact, the most that Section 629 can be argued to require is that a market for navigation devices

¹⁷ *Id.*

¹⁸ Letter from Ross Lieberman, Senior Vice President of Regulatory Affairs, American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission (Feb. 11, 2016), p. 8.

manufactured by parties other than MVPDs be allowed to develop. In fact, as TIVO correctly noted, “the Commission could simply limit application of its proposed rules to MVPDs serving one million or fewer subscribers on the basis that such smaller MVPDs will have little ability to advance the statutory goal of assuring the availability of third-party navigation devices.”¹⁹ In other words, a market for commercial devices made by third parties will still develop even if the Information Flows or Apps Alternative proposals are mandated only for MVPDs with 1 million or more consumers. Put another way, the Commission can achieve its goals in this proceeding while also adopting a small MVPD exemption that accounts for these carriers’ unique circumstances.

As a Matter of Proper Administrative Procedure, the Commission Should Issue a Further Notice of Proposed Rulemaking in this Proceeding

Finally, NTCA urges the Commission to issue a further notice of proposed rulemaking in this proceeding. Additional consideration and public input is necessary to ensure that the Commission, consumers, and interested stakeholders can adequately consider the various approaches discussed herein.

Recent developments suggest that the Commission has strayed far beyond the goals of this proceeding as set forth in the NPRM. In particular, the Commission’s recent discussions with certain industry stakeholders raise troubling questions.²⁰ More specifically, to the extent that the Commission seeks to ensure that consumers have access to a competitive user interface that also offers “integrated search” for both MVPD and over-the-top (“OTT”) content via an app-based approach to content delivery, for example, the Commission cannot move forward to adopt rules that require MVPDs to offer such functionality absent a further notice seeking comment on the ramifications (including the limits of the Commission’s legal authority pursuant to Section 629) of such an approach. Certainly, a compromise proposal offered by one segment of the industry and negotiated behind closed doors cannot by law form the basis of rules applicable to the entire MVPD industry or attempt to replace proper notice and comment procedures, particularly as the details of that proposal stray from the original NPRM that failed to declare items such as “integrated search” to be the goal.²¹ This proceeding ostensibly began as an effort to “fulfill [the

¹⁹ TIVO April 22 Comments, p. 34.

²⁰ *FCC Seeks Clarity and Detail on “Ditch the Box,”* Fiercecable.com (Jul. 11, 2016) (stating that “FCC staffers have furnished the NCTA and other backers of the ‘Ditch the Box’ proposal with a detailed list of questions about their alternative suggestion for opening the pay-TV ecosystem to third-party devices.”), available at: <http://www.fiercecable.com/story/fcc-seeks-clarity-and-detail-ditch-box/2016-07-11>; *CVCC Prods Cables Ditch the Box*, Multichannel.com (Jul. 5, 2016) (stating that “[i]n meetings with top FCC officials, the CVCC, comprising computer companies and others pushing for access to cable box info for their own navigation devices, did find some upside to the cable proposal, saying it now acknowledged the need for “(1) open standards, (2) user interface competition (to some degree), (3) integrated search and (4) commercial freedom for device makers.”), available at: <http://www.multichannel.com/news/fcc/cvcc-prods-cables-box-ditch-pitch/406108>

²¹ *See, Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C.Cir.2005) (stating that pursuant to the Administrative Procedure Act, “[n]otice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2)

Commission's] obligation under Section 629 of the Communications Act to assure a commercial market for devices that can access multichannel video programming and other services offered over multichannel video programming systems.”²² That it has morphed into one seeking “integrated search” via app-based content delivery smacks of a “moving of the goalposts” at odds with both the Administrative Procedure Act and good public policy. To the extent that the Commission feels that such features will provide benefits to consumers that outweigh the costs to MVPDs and that might not be available absent regulatory intervention, it can and should issue a further notice of proposed rulemaking (and not merely a Public Notice) to allow interested stakeholders of all sizes the opportunity to fully vet the Commission's proposals.

Beyond that, the Apps Alternative raises additional questions that should be the subject of a further notice of proposed rulemaking. For one, the Commission should inquire as to the terms and conditions under which MVPD apps would be licensable to other MVPDs and the technical feasibility of such an approach. The Commission should also inquire as to whether such an approach would enable MVPDs to innovate rapidly to respond to consumer demand and changing technologies.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS.

Respectfully submitted,



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to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.”).

²² NPRM, ¶ 1.